

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06

Date: 15 January 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Order Regarding the "Prosecution's Information of the Status of Disclosure"

Order to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence
Marc Desalliers

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Other

REGISTRY

Registrar
Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ hereby issues this Order Regarding the “Prosecution's Information of the Status of Disclosure” (the “Prosecutor’s Information” or “Information”).²

I. Procedural History

1. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.³
2. On 17 May 2013, the Single Judge issued the “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties” so as to provide the parties with a precise timetable for disclosure.⁴
3. On 17 June 2013, the Single Judge issued the “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”,⁵ in which the Single Judge, *inter alia*, postponed the commencement of the confirmation of charges hearing until Monday, 10 February 2014 and established a new calendar for the disclosure of evidence between the parties.
4. On 10 January 2014, the Single Judge received the Information, in which the Prosecutor “informs the Single Judge of the status of disclosure in this case,

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 March 2013, ICC-01/04-02/06-40.

² ICC-01/04-02/06-201.

³ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 12 April 2013, ICC-01/04-02/06-47.

⁴ Pre-Trial Chamber II, “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties”, 17 May 2013, ICC-01/04-02/06-64.

⁵ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”, ICC-01/04-02/06-73.

including of items collected under conditions of confidentiality pursuant to article 54(3)(e) of the Rome Statute".⁶

5. On 14 January 2014, the Defence filed the "Réponse de la Défense de M. Bosco Ntaganda à la 'Prosecution's Information on the Status of Disclosure' transmise le 9 janvier 2014" (the "Defence's Response" or "Response").⁷

II. Applicable Law

6. The Single Judge notes articles 21(1)(a), (2) and (3), 54(3)(e) and 67 of the Rome Statute (the "Statute") and rule 77 of the Rules of Procedure and Evidence (the "Rules").

III. The Disclosure of Analogous Information

7. In the Prosecutor's Information, it is stated that between "27 March 2013 and 9 January 2014, the Prosecution requested the lifting of restrictions to over 900 items",⁸ in accordance with article 54, paragraph 3 (e) of the Statute, in order to be in a position to disclose them to the Defence. The Prosecutor further informs the Chamber that she was unable to obtain the lifting of restrictions for 115 of those "over" 900 items which, according to her, "contain information that may be material to the preparation of the Defence pursuant to rule 77" (the "115 documents").⁹ It is further argued that, "[w]hile the Prosecution cannot disclose the 115 items until the sources lift restrictions, it can advise the Single Judge that it has disclosed to the Defence items of evidence that contain analogous information to the information contained in the restricted items, as referenced in Confidential, *ex parte* Prosecution Only Annex A."¹⁰

⁶ ICC-01/04-02/06-201, para. 1.

⁷ ICC-01/04-02/06-208.

⁸ ICC-01/04-02/06-201, para. 5.

⁹ ICC-01/04-02/06-201, para. 6.

¹⁰ ICC-01/04-02/06-201, para. 7.

8. In the Defence's Response, it is indicated that the Defence does not have any information concerning the nature of these items of evidence.¹¹ In addition, in the view of the Defence, it is essential that these documents be submitted to the Chamber so that it may be informed of the nature of the information communicated to the Defence and so that it may determine whether the solution proposed by the Prosecutor is appropriate.¹²

9. The Single Judge is surprised by the amount of evidence which has been collected by the Prosecutor under article 54(3)(e) of the Statute and the time she has taken to obtain the lifting of restrictions by the providers. In any case, the Single Judge must, as ruled by the Appeals Chamber,¹³ retain control over the disclosure process and cannot leave the possibility to the Prosecutor to assess the importance of the information that has not been disclosed to the Defence, although material for its preparation, or whether analogous information would suffice for the exercise of the rights of the Defence.

10. The Single Judge takes note of the Prosecutor's assertion that she has provided a list of alternative evidence in a confidential *ex parte* annex¹⁴ and also notes that the Prosecutor failed to explain how the information contained in these items of evidence is analogous to the information contained in the 115 documents. Thus, the Single Judge considers it imperative that the Chamber conducts an independent assessment of these materials and verifies whether the analogous information presented by the Prosecutor preserves the rights of the Defence.

¹¹ ICC-01/04-02/06-208, para. 13.

¹² ICC-01/04-02/06-208, para. 14.

¹³ Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, paras. 37-55.

¹⁴ ICC-01/04-02/06-201-Conf-Exp-AnxA.

11. Consequently, the Single Judge orders the Prosecutor to provide the Chamber on a confidential, *ex parte*, basis, with the 115 documents, accompanied with a chart detailing what alternative evidence has been provided to the Defence and in what manner the alternative evidence is claimed to be analogous to the 115 documents.

III. The Remaining Observations of the Defence

12. In addition, the Defence advances that the Prosecutor fails to provide reasons for the belated disclosure of evidence falling within the ambit of either article 67(2) of the Statute or rule 77 of the Rules.¹⁵

13. Therefore, the Defence requests the Single Judge to order the Prosecutor to: (i) submit to the Chamber and to the Defence the ERN numbers of all documents related to the present case that have been obtained on condition of confidentiality pursuant to article 54(3)(e) of the Statute, whether such documents have been disclosed to the Defence or not; (ii) to detail which of these documents contain information pertaining to article 67(2) of the Statute or rule 77 of the Rules and which have not yet been disclosed to the Defence, including where such information would be found in documents classified as incriminating by the Prosecutor; and (iii) if need be, to request a waiver of confidentiality to the information provider of each piece of evidence for which no request has been formulated yet and which contains information pertaining to article 67(2) of the Statute or rule 77 of the Rules and have not been disclosed to the Defence yet, including where such information would be found in documents classified as incriminating by the Prosecutor.¹⁶

14. In view of the approaching date of the confirmation of charges hearing and taking account of the sensitive nature of the issues put forward by the Defence, the Single Judge is of the view that the submissions of the Defence merit careful additional consideration. Therefore, the Single Judge orders the Prosecutor to submit

¹⁵ ICC-01/04-02/06-208, paras. 16-25.

¹⁶ ICC-01/04-02/06-208, p. 8-9.

observations on the aforementioned assertions of the Defence and any other concern raised by the Defence in its Response.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- (a) orders** the Prosecutor to provide to the Chamber on a confidential, *ex parte*, basis the 115 documents, accompanied with a chart detailing what alternative evidence has been provided to the Defence and in what manner the alternative evidence is claimed to be analogous to the 115 documents, no later than Friday 17 January 2014 at 16h00; and
- (b) orders** the Prosecutor to submit observations on the elements specified in paragraphs 12 and 13 of the present order and on any other concerns raised by the Defence in its Response, no later than Friday 17 January 2014 at 16h00.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova

Single Judge

Dated this Wednesday, 15 January 2014

At The Hague, The Netherlands